Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance for Law	)	ET Docket No. 04-295
Enforcement Act and Broadband Access and	)	
Services	)	RM-10865

COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

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TABLE OF CONTENTS

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Global Crossing North America Inc., on behalf of its U.S. operating subsidiaries (collectively referred to as "Global Crossing"), hereby submits its initial Comments in response to the Commission's Notice of Proposed Rulemaking (the "*NPRM*") in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

Global Crossing provides telecommunications solutions over the world's first integrated global Internet Protocol- ("IP-") based network. Its core network connects more than 200 cities and 27 countries worldwide, and delivers services to more than 500 major cities, 50 countries and 5 continents around the globe. Global Crossing offers a full range of managed data and voice products, including IP virtual private network services, managed services and voice over IP services, to more than 40 percent of the Fortune 500, as well as 700 carriers, mobile operators and Internet Service Providers ("ISPs").

Global Crossing is proud to have perhaps the most secure network in the telecommunications industry, having entered into a comprehensive network security agreement in September 2003 with the Departments of Justice, Homeland Security and Defense, and the Federal

[1] *Communications Assistance for Law Enforcement Act and Broadband Access Services*, Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865, FCC 04-187 (rel. Aug. 9, 2004) ("*NPRM*").

Bureau of Investigation ("FBI"), that imposes significant obligations on the company to ensure that U.S. communications and related information are protected. This precedent-setting agreement expressly obligates Global Crossing to provide technical or other assistance to Law Enforcement to facilitate electronic surveillance over its domestic facilities. The agreement not only sets the bar higher for network security, but it enhances the company's long-standing culture of security. As it did before entering into the network security agreement, Global Crossing will continue to cooperate with Law Enforcement in the future to ensure that it complies in full with its network security agreement and all applicable laws, including the Communications Assistance for Law Enforcement Act ("CALEA").

Despite its commitment to security, Global Crossing is concerned that some of the Commission's tentative conclusions in the *NPRM* extend well beyond CALEA's permissible scope and could effectively prohibit the provision of certain IP-based services. *First*, the Commission's discretion to expand the scope of CALEA does not extend to information services, including broadband access services. Not only has the Commission failed to state a logical basis for application of CALEA's "Substantial Replacement Provision" to broadband access services, but the Commission's broad interpretation of the statute would set an unjustified precedent for extending CALEA to additional information services in the future.

Second, if the Commission nevertheless determines that CALEA applies to broadband services, that determination would be a substantial shift in Commission policy. Because of the complex technical ramifications of such a decision – indeed, CALEA solutions do not currently exist for certain types of IP-based services – the Commission should give industry a reasonable opportunity to coordinate carrier efforts and to develop uniform solutions for compliance with this new statutory interpretation. A coordinated industry effort will promote a

more cost effective and efficient process toward compliance, to the benefit of both carriers and Law Enforcement.

Third, the Commission should ensure that Law Enforcement fairly compensates carriers for complying with surveillance requests, as existing statutes require. The Commission should not effectively force carriers to pass through the entirety of these costs to consumers, as incorporating CALEA costs into retail rates would cause certain packet-mode services to become prohibitively expensive.

II. THE STATUTE DOES NOT AUTHORIZE THE COMMISSION TO APPLY CALEA CAPABILITY REQUIREMENTS TO INFORMATION SERVICES

A. The Commission's Discretion to Define "Telecommunications Carrier" Does not Extend to Information Services

In the *NPRM*, the Commission tentatively concludes that, because the definition of "telecommunications carrier" is broader in CALEA[2] than in the Communications Act, [3] CALEA covers broadband access services.[4] The Commission bases its tentative conclusion on its interpretation of CALEA's "Substantial Replacement Provision,"[5] which grants the Commission

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2 CALEA defines a telecommunications carrier as "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." 47 U.S.C. § 1001(8).

3 The Communications Act defines telecommunications carrier as "any provider of telecommunications services," and "telecommunications services" as the common carrier offering of "telecommunications." 47 U.S.C. §§ 153(44)-(46). "Telecommunications" means, in relevant part, "the transmission . . . of information of the user's choosing, *without change in form or content* of the information as sent and received." *Id.* § 153(43). The Commission tentatively concluded that "telecommunications carrier" under CALEA is not constrained by the requirement that the transmission not "change in form or content," allowing CALEA to reach a broader range of services. *NPRM* at ¶ 43 & n.104.

4 *NPRM* at ¶ 38.

5 The "Substantial Replacement Provision" authorizes the Commission to apply CALEA to an entity that otherwise would not be considered a telecommunications carrier if: (1) the entity is engaged in providing wire or electronic communication switching or transmission services;

discretion to expand the reach of the statute to additional entities that otherwise do not fit the definition of "telecommunications carrier." However, any interpretation of "telecommunications carrier" that reaches broadband access services – clearly an information service under Commission precedent – is impermissibly overbroad. Congress placed a bright line limit on the services to which the Commission may apply the general Substantial Replacement Provision by specifically excluding information services from the definition of "telecommunications carrier."[6] As the statute plainly states, the term "telecommunications carrier" "does not include . . . persons or entities insofar as they are engaged in providing information services."[7]

The Commission attempts to circumvent the statutory bar on subjecting CALEA to information services by concluding that "where a service provider is determined [by the Commission] to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for the purpose of CALEA."[8] This conclusion turns the plain language of the statute on its head. Rather, if the Commission determines that a service is an information service, Congress has barred application of the Substantial Replacement Provision to

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(2) the Commission finds that the service is a replacement for a substantial portion of the local telephone exchange service; and (3) that it is in the public interest to deem such a person or entity to be a telecommunications carrier for the purposes of CALEA. *Id.* § 1001(8)(B)(ii).

6 47 U.S.C. § 1001(8)(C)(i).

7 *Id.*

8 *NPRM* at ¶ 50. As explained by Congress:

> The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public-switched network where law enforcement agencies have always served most of their surveillance orders. . . . . Earlier digital telephony proposals covered all providers of electronic communications services, which meant every business and institution in the country. That approach was not practical. Nor was it required to meet an important law enforcement objective.

House Report at 18-19.

that service. This specific bar governs the Commission's more general discretion under the Substantial Replacement Provision.[9]

As the Commission recognizes in the *NPRM*, there is ample Commission precedent that broadband access services are information services for the purposes of both CALEA and the Communications Act.[10] In a separate ongoing proceeding, the Commission is considering the regulatory treatment of IP-enabled services, and Global Crossing also has advocated that such services are information services under the Communications Act.[11] The Commission recognizes in the *NPRM* that its tentative conclusion that broadband services are subject to CALEA "could be said to depart from our prior statement that . . . the mere use of transmission facilities would not make [an information services] offering subject to CALEA as a telecommunications service."[12] Where a carrier provides both telecommunications services and information services, the Commission has found that the carrier's facilities are subject to CALEA to provide surveillance capabilities *only with regard to the telecommunications services.*[13]

The Commission reached its earlier determination that broadband access services are information services because such services incorporate the very features that define information services: the "offering of a capability for generating, acquiring, storing, transforming,

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9 *See generally*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general").

10 *NPRM* at ¶ 50.

11 *See, e.g.*, Comments of Global Crossing, WC Docket No. 04-36 (filed May 28, 2004). *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003) (finding that the VOIP services provided by Vonage constitute information services).

12 *NPRM* at n.131 (quoting *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, at ¶ 27 (2000) ("*Second R&O*")).

13 *Id.*; 47 U.S.C. §§ 1001(8)(B)(ii), 1002(b)(2)(A).

processing, retrieving, utilizing, or making available information via telecommunications."[14] In contrast to the definition of "telecommunications carrier," the Commission concedes that the definition of "information service" in the Communications Act is substantially similar to the definition in CALEA.[15] The Commission never attempts to explain how an information service under the Communications Act could somehow *lose* that categorization under CALEA. Because the Commission has found that broadband access services are information services, and has not provided reasonable justification for changing that conclusion, the Commission cannot apply CALEA to those services.

B. The Commission Cannot Rewrite the "Substantial Replacement Provision" to Remove the Limiting Standard Set by the Provision's Plain Language

The Commission tentatively concludes that broadband access services are covered by CALEA because such services are a "substantial replacement" for narrowband ("dial-up") Internet access services, a function "previously provided via POTS."[16] To reach this conclusion, however, the Commission applies an impermissibly broad interpretation of its discretion that contravenes the plain meaning of the statute.

The Commission can invoke the Substantial Replacement Provision only if it finds that the service is a "replacement for a *substantial portion* of the local telephone exchange service."[17] The Commission incorrectly rewrites this phrase to mean "the replacement of *any*

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[14] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, CC Docket No. 02-33, 17 FCC Rcd 3019, at ¶ 21 (rel. Feb. 15, 2002); 47 U.S.C. § 1001(6).

[15] 47 U.S.C. § 1001(6). "Information service" is defined in CALEA as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." *Id.*

[16] *NPRM* at ¶ 44.

[17] 47 U.S.C. § 1001(8)(B)(ii) [emphasis added].

portion of an individual subscriber's functionality previously provided via POTS."[18] But replacing the word "substantial" with the word "any" is not "a permissible construction of the statute"[19] because the term "substantial portion" sets a high bar that requires the Commission to set *some* limiting standard.[20]

As the Commission acknowledges, it has interpreted "substantial portion" much more strictly in the past in the context of the Communications Act.[21] The Commission's explanation that "the meaning of certain terms for the Communications Act and CALEA are different"[22] fails because Congress did not define "substantial replacement" in either statute. Where terms are not defined, the Commission must interpret the terms consistent with their plain meaning.[23] In the context of defining the term "substantial" with regard to Section 332(d)(1)(B) of the Communications Act, the Commission looked to Webster's New World Dictionary, which defines "substantial" as "'considerable; ample; large' or 'of considerable worth or value;

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18 *NPRM* at ¶ 44 [emphasis added].

19 *United States Telecom Assoc. v. FCC*, 227 F.3d 450, 457-58 (D.C. Cir. 2000) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")).

20 *See generally*, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 387 (1999) [emphasis in original] (declining to confine the Commission to any particular interpretation for the "necessary and impair" standard for UNE access, but confirming that the statute "requires the FCC to apply *some* limiting standard").

21 *NPRM* at n.113.

22 *Id.*

23 *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (finding that administrative interpretation of a statute contrary to its plain language is not entitled to deference); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (reviewing court gives deference to agency's interpretation of the statute only if agency's interpretation is not in conflict with the plain language of the statute); *National R. R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 417-18 (1992) (same).

important.'"[24] The word "any" is not among the wide of array of permissible interpretations available to the Commission.

Similarly, the Commission was particularly strict in its interpretation of a similar phrase – "substitute for land line telephone exchange service for a substantial portion of communications within a state" – when determining whether the state may rebut the statutory presumption that CMRS carriers are exempt from state rate and entry regulation. In that context, the state must show that "a substantial portion of the CMRS subscribers in the state or a specified geographic area have no alternative means of obtaining basic telephone service."[25]

In other words, the Commission consistently has found "substantial" to require a finding of great significance, which the word "any" fails to provide. The Commission's erroneous conclusion that broadband access services are covered by CALEA because such services are a replacement for dial-up Internet services brings the issue sharply into focus. This conclusion requires a finding that "dial-up Internet access" is a "substantial portion of the local telephone exchange service,"[26] but the Commission never makes such a finding. Instead the Commission finds that CALEA applies to broadband services because they fit the definition of "any" service that consumers also can access "via POTS."[27] Weighing heavily against this conclusion, however, is the fact that the statute never required telecommunications carriers to provide CALEA capabilities for surveilling Internet access, even "via POTS."[28] Considering that Internet access via POTS was never a service to which CALEA capabilities applied, it is quite a stretch to claim

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[24] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, n.132 (1994).

[25] *Id.* ¶ 253.

[26] 47 U.S.C. § 1001(8)(B)(ii).

[27] *NPRM* at ¶ 44.

[28] *Id.* ¶ 47 n.131 (quoting *Second R&O* at ¶ 27).

that narrowband Internet access is "a substantial portion of the local exchange service." In fact, the Commission would be greatly expanding, not preserving, Law Enforcement's surveillance capabilities if it applies CALEA to broadband access services.[29] Therefore, the Commission's tentative holding that broadband services is a "substantial replacement" for the local exchange service does not withstand scrutiny.

III. RATHER THAN RUSH TO JUDGMENT, THE COMMISSION SHOULD ESTABLISH A FRAMEWORK TO ADDRESS CALEA CAPABILITIES FOR NEWLY COVERED SERVICES IN A COOPERATIVE AND COMPREHENSIVE MANNER

A. The Commission's Proposals Are Unworkable For Many Broadband Services

If the Commission determines (notwithstanding the statutory language to the contrary) that broadband services must comply with CALEA, it would be a significant shift in the law and would present industry with a substantial task to bring these newly covered services into compliance.[30] Industry shares Law Enforcement's frustration with the uncertainty surrounding which packet mode services are covered by CALEA. However, for certain IP-based services, the technology required to comply with CALEA is not sufficiently developed and, to the extent such technology exists, its cost could make continued provision of the service impracticable.

To the extent that the Commission brings new services under the purview of CALEA, or clarifies that certain services are covered where uncertainty currently exists, the Commission should allow sufficient opportunity for the industry to develop CALEA solutions on

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29 *See* 140 Cong. Rec. 27708 (Oct. 4, 1994) (statement of Rep. Markey) ("the [Federal] Bureau [of Investigation] argues we must update and clarify our laws so that their ability to conduct wiretaps is maintained – not expanded and not diminished – just maintained").

30 According to the *NPRM*, the Commission has received 800 petitions to extend the deadline for CALEA compliance for packet-mode services and "roughly a quarter" cite a lack of clarity of their regulatory obligations as the reason for the extension, while some petitioners sought extensions despite the fact that they claim that "their services are not subject to CALEA at all." *NPRM* at ¶ 95.

a systematic basis. Without uniform standards, neither industry nor Law Enforcement will have certainty regarding what it means to be CALEA compliant with regard to any particular service or technology. Moreover, the Commission's tentative conclusion to apply CALEA to broadband access services raises numerous questions related to network architectures and service quality, especially for IP-to-IP communications.

For example, Congress anticipated that Law Enforcement likely would intercept packet-mode communications "at the same place it intercepts other electronic communications: at the carrier that provides access to the public-switched network."[31] But because many broadband services never touch the PSTN, such services provide significant technical hurdles. The technical issues range from isolating individual data streams to maintaining network performance to avoid detection by the surveillance target. Adding surveillance capabilities to an entire network also may slow data speeds, degrading the performance that customers have come to expect. Further, adding monitoring functionality could substantially change the economics of providing certain broadband access services. Global Crossing has explored methods by which it could add surveillance capabilities to its network for services for which no CALEA solution exists, such as substantially expanding its use of session border controllers to filter data, and it has approached third party vendors to determine the cost and availability of CALEA solutions for broadband services. Despite these efforts, for a subset of IP-to-IP services, CALEA solutions are not currently available or would require network changes that would make compliance prohibitively expensive.

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[31] House Report at 24; *see* 47 U.S.C. § 1008(a)(2) (allowing enforcement only if there another carrier's facilities could not provide the necessary surveillance capabilities to carry out the surveillance order).

Application of CALEA to broadband access services also raises serious issues when the facilities provider does not provide the services that Law Enforcement seeks to surveil. In many instances, for example, broadband services providers provide their customers only with transmission capabilities with guaranteed levels of capacity and speed, but do not provide individual services to the customers. In such a case, the Commission should clarify that Law Enforcement should direct its surveillance requests to the service provider rather than the facilities provider. The statutory language and legislative history appear to weigh heavily against Law Enforcement seeking to intercept individual data streams over large data transmission "pipes" of the type that dominate such networks.[32] Moreover, there may be cases in which a carrier is unable to isolate the individual communications authorized by a wiretap order from the much larger data stream traversing the carrier's transmission facilities. In such instances, Law Enforcement access to the entire data stream raises significant concerns regarding privacy issues and uncertainty by carriers faced with a wiretap order.[33]

Additionally, where the customer separately procures its own services, such as VOIP or Internet services, from different vendors, it is unclear who would be responsible for implementing surveillance requests – the facilities provider or the services provider. Carriers such as Global Crossing have no commercial reason to monitor a customer's use of that transmission

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[32] House Report at 24 (voicing disapproval for trunk line intercepts as in violation of "the minimization requirement of current law").

[33] *See Communications Assistance for Law Enforcement Act*, Order on Remand, CC Docket No. 97-213, 17 FCC Rcd 6896, at ¶¶ 87-89 & n.220 (2002). In its Order on Remand, the Commission confirmed that carriers may provide Law Enforcement access to communications only to the extent authorized by court order. *Id.* ¶ 89. If a wiretap order authorizes surveillance of information in a data stream that cannot be separated from information not authorized by the order, the carrier may not give Law Enforcement the entire data stream under assurances that Law Enforcement will extract only the information to which it is lawfully entitled. *Id.*

capability, and, in fact, adding a monitoring function would increase the cost of service and likely would degrade service quality, including impairing transmission speeds. In many cases, the customer does not even require a third party service provider, but, instead, the customer manages the provision of service itself, through its own equipment. In that scenario, the broadband service provider has no idea what equipment the customer is utilizing and therefore does not know how to eavesdrop on the communication. Considering that one of the salient features of IP networks is the separation of content and the network, and the deployment of intelligence at the edge of the network instead of the core, this scenario is going to become more commonplace. That is, customers are going to gain greater and greater control over the nature and design of their service offerings, thus complicating efforts to surveil it from a central location.

The network architecture of these communications is point-to-point; inserting service provider interaction in the middle of such communications would be problematic especially where speed is at a premium. An added layer of interaction with the facilities provider also would add substantial costs to provisioning of these currently unmediated services. These are precisely the type of "peer-to-peer" communications to which the *NPRM* refers in the VOIP context, and which "Law Enforcement indicates . . . are not intended to be covered by CALEA."[34] The Commission should clarify that such customer-managed services are not subject to CALEA.

Thus, if the Commission determines to reverse course and apply CALEA to broadband access services, it is imperative that the Commission provide industry sufficient opportunity to develop CALEA solutions based on uniform standards, so that the industry can determine the most efficient, lowest cost means to fulfill Law Enforcement's surveillance needs. The Commission should also clarify that facilities providers are not responsible under CALEA for

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[34] *NPRM* at ¶ 54.

surveiling the services that their customers self-provision or obtain from third party service providers.

B. The Commission Should Continue To Grant Extension Petitions and Encourage Reinstatement of the FBI's Flexible Deployment Program for Packet-Mode Communications

In the *NPRM*, the Commission tentatively concludes that it should grant petitions exempting carriers from CALEA compliance only in "extraordinary cases."[35] However, as a general matter, the industry will require a period of time to bring certain packet-mode services into compliance, including many services that the Commission previously has stated are not covered by CALEA. The Commission therefore should continue to grant extensions of time to individual carriers for CALEA compliance and encourage reinstatement of the FBI's Flexible Deployment Program with regard to such services, rather than set strict across-the-board deadlines for compliance or require carriers to remove non-compliant services from the market.

Global Crossing agrees with the Commission's proposal *not* to adopt law enforcement's "presumptions" for whether CALEA will cover a new service in order to "ensur[e] that service offerings are CALEA-compliant on or before the date they are introduced into the marketplace."[36] The FCC correctly found that such a "pre-approval" approach to the introduction of new services would be "inconsistent with the statutory intent and could be an obstacle to innovation."[37] As the Commission correctly concluded, Law Enforcement's proposals that the Commission employ standardized time benchmarks for compliance are unrealistic and fail to

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35 *Id.* ¶ 104.

36 *Id.* ¶ 60.

37 *Id.* ¶ 61.

provide for the realities of developing technology solutions for diverse services.[38] Congress made clear the Commission should not require broadband services providers to forgo provision of new services or take services off line if CALEA solutions are not yet available. As Congress explained, "The requirements of [CALEA] will not impede the development and deployment of new technologies. . . . [I]f a service *cannot* reasonably be brought into compliance with the interception requirements, then the service or technology *can* be deployed."[39]

In addition, as noted above, in order to best fulfill its mandate under CALEA to provide for the needs of Law Enforcement in a rational manner, the Commission should grant extensions of time to comply with CALEA under both Section 107(c) and Section 109(b) as appropriate. Although Section 107(c) is limited in its reach only to facilities deployed prior to October 25, 1998, there is no reason that the Commission should not continue to grant extensions of time for facilities deployed after that date pursuant to Section 109(b), by granting Section 109(b) exemptions for a specified period of time. The availability of extensions pursuant to Section 109(b) will uphold Congress's intention that carriers continue to provide advanced services until CALEA solutions are available. For this same reason, the Commission should continue to apply a preliminary grant to extension petitions when filed, so that carriers may launch new services pending Commission review. Any decision to discontinue the policy of preliminary grants would be tantamount to requiring "pre-approval" of new technologies, which the Commission has tentatively rejected as "inconsistent with the statutory intent and . . . an obstacle to innovation."[40]

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38 *Id.* ¶ 91.

39 House Report at 19 [emphasis in original].

40 *NPRM* at ¶ 61.

The Commission also should encourage the FBI to re-establish the Flexible Deployment Program for packet-mode technologies, which would effectively re-establish Law Enforcement as the primary contact for carriers seeking extensions of time for compliance. The Flexible Deployment Program, as implemented by the Commission and Law Enforcement, is an efficient method of determining Law Enforcement's needs and individual carriers' current surveillance capabilities and plans to reach full CALEA compliance. For instance, it very well could be "not reasonably achievable" for a carrier to establish across-the-board CALEA compliance, but less burdensome for the carrier to target certain facilities for compliance. By providing a greater focus on the most critical surveillance needs, individual carriers will be better able to provide the most pressing surveillance capabilities to Law Enforcement in the most efficient and timely manner.

IV. CARRIERS SHOULD BE COMPENSATED FOR CALEA-RELATED COSTS

In the *NPRM*, the Commission sought comment on how carriers may obtain reimbursement for intercept provisioning costs, but did not reach any tentative conclusions on this issue.[41] The Commission should clarify that carriers may seek to recover costs from Law Enforcement for CALEA compliance network modifications as part of cost recovery for individual wiretap requests.[42] Congress provided balance between the very real needs of Law Enforcement and the potentially crippling costs of implementing surveillance capabilities. As part of the partnership between Law Enforcement and industry, Law Enforcement should continue to share the cost of CALEA compliance, especially where compliance might otherwise not be "reasonably achievable" under the statute.

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41 *Id.* ¶¶ 132-134.

42 *Id.* ¶ 133.

If the Commission expands CALEA's reach to broadband access services, industry may be required to invest extraordinary sums for minimal or no enhancements to national security and public safety. Carriers such as Global Crossing that have been subject to no or few wiretap requests should not be required to make substantial capital expenditures for network upgrades when Law Enforcement has no reasonable expectation that it will take a greater interest in surveillance over that carrier's facilities in the near future. Similarly, if a carrier makes significant investments to make its network compliant with CALEA and only receives a small number of wiretap requests, there should be some mechanism for the carrier to recover its costs.

Indeed, the wiretap statutes that authorize Law Enforcement's surveillance activities explicitly require Law Enforcement to compensate carriers for the costs of each surveillance request.[43] Especially for broadband services companies, such as Global Crossing, that receive very few wire tap requests, the vast majority of surveillance costs are likely to be network upgrades to make surveillance possible on that company's facilities, not the incremental costs of an individual wiretap.

If carriers are unable to recover the costs of surveillance from Law Enforcement, then carriers will need to seek cost recovery from their customers through higher rates. Nothing in CALEA or the Communications Act prohibits carriers from passing through surveillance costs to customers, but customers should not bear the full burden of CALEA. Requiring customers to shoulder the costs of CALEA likely would cause certain services to become prohibitively expensive. Reliance on cost recovery from customers also would disproportionately affect

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[43] *See, e.g.*, 18 U.S.C. § 2518(4) (telecommunications carriers "shall be compensated . . . by [Law Enforcement] for reasonable expenses incurred in providing such facilities or assistance" required to comply with a surveillance order); *NPRM* at ¶ 134 ("As Law Enforcement acknowledges, Title III of OCCSSA generally authorizes carriers to recover intercept provisioning costs from law enforcement.").

companies, such as Global Crossing, that have relatively small customer bases over which to defray costs. If the Commission does not require Law Enforcement to compensate carriers fairly for costs associated with wiretaps, it would place companies that specialize in broadband services at a significant competitive advantage compared to larger companies, such as the Bell Operating Companies. CALEA instructs that a major factor in determining whether CALEA compliance is reasonably achievable is "whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems . . . ."[44] The Commission should be wary of cost recovery proposals that might cause services to become uneconomical, and not relieve Law Enforcement of their statutory responsibility to reimburse carriers for the costs of implementing surveillance orders.

[44] 47 U.S.C. § 1008(b).

V. CONCLUSION

For the foregoing reasons, the Commission should conclude that CALEA does not apply to broadband access services. If the Commission nevertheless determines to extend CALEA to broadband access services, the Commission should provide the industry with adequate time to develop compliance solutions. The Commission also should not relieve Law Enforcement of its statutory obligation to fairly compensate carriers for the costs of complying with surveillance requests.

Respectfully submitted,

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